

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: Operation of the Missouri River	)	No. 03-MD-1555 (PAM)
System Litigation	)	
	)	
STATE OF MISSOURI, ex rel. Jeremiah W.	)	
(Jay) Nixon,	)	
	)	
vs.	)	Civil No. 06-CV-01616 PAM
	)	
UNITED STATES ARMY CORPS OF	)	
ENGINEERS, FRANCIS J. HARVEY,	)	
SECRETARY OF THE ARMY, UNITED	)	
STATES DEPARTMENT OF DEFENSE,	)	
and BRIGADIER GENERAL	)	FEDERAL DEFENDANTS'
GREGG F. MARTIN,	)	REPLY IN SUPPORT OF THEIR
	)	MOTION FOR SUMMARY
Defendants.	)	JUDGMENT
	)	

**INTRODUCTION**

Defendants United States Army Corps of Engineers, Francis J. Harvey, Secretary of the Army, United States Department of Defense, and Brigadier General Gregg F. Martin (collectively, the "Corps") hereby submit this reply memorandum in support of their Motion for Summary Judgment.

In this matter, the Corps prepared an extensive Final Environmental Impact Statement ("FEIS") for the adoption of the Master Manual. The United States Fish and Wildlife Service ("FWS") determined that the Corps' proposed action was likely to result in jeopardy to the endangered pallid sturgeon and recommended the Corps avoid such jeopardy by implementing a bimodal spring pulse. Based on this determination and in order to avoid violating the Endangered Species Act ("ESA"), the Corps prepared an EA examining the environmental

impacts of technical criteria for a bimodal spring pulse plan to the Manual. The Corps concluded, based on the Administrative Record, that the technical criteria would have impacts that were within the range or less than those spring rise alternatives studied in the FEIS. Thus, the EA “concludes that there are no new significant environmental impacts of the proposed action that have not been evaluated in the FEIS and that warrant the preparation of a Supplemental Environmental Impact Statement before implementation of the bimodal spring pulse.” *See* EA (SAR 8, Exh. 3088) at 1. The Federal Defendants’ memorandum supporting its motion for summary judgment and memorandum in opposition to Missouri’s cross-motion for summary judgment amply demonstrate that the Corps complied with — and, indeed, exceeded in many cases — the National Environmental Policy Act’s (“NEPA”) requirements.

Most of the arguments the State of Missouri (“Missouri”) makes in its brief in opposition to the Federal Defendants’ motion for summary judgment are addressed in the Federal Defendants’ previously filed memoranda. This reply brief, therefore, addresses only those issues that Missouri argued further in its opposition brief. Summary judgment in favor of the Federal Defendants is appropriate for several reasons. First, the Corps fully complied with NEPA’s procedural mandates by preparing an Environmental Assessment (“EA”) to determine if a Supplemental Environmental Impact Statement (“SEIS”) was necessary to evaluate proposed changes to the Master Manual that would add technical criteria for implementation of a bimodal spring pulse releases. Second, the Corps properly concluded that no SEIS was necessary because the change to the Master Manual would not have new significant environmental impacts that had not been previously analyzed. Third, with regard to the spring pulse criteria the Corps provided for more public comment and participation than NEPA requires. Finally, the record

supports the Corps' conclusions that a bimodal spring pulse are necessary to avoid violation of the Endangered Species Act ("ESA").

### ARGUMENT

#### **A. The Corps Fully Complied With NEPA's Procedural Mandates By Preparing an EA to Determine if an SEIS was Necessary.**

In Missouri's Memorandum in Opposition to Federal Defendants' Motion for Summary Judgment ("Missouri's Opposition"), Missouri acknowledged that its motion for summary judgment does not argue that the EA itself is inadequate. *Missouri's Opp'n* at 4. Instead, Missouri predicates its claim "on the Corps' failure to follow mandated procedures." *Id.* Despite clear and controlling case law indicating otherwise, Missouri continues to argue that NEPA allows the Corps only three options when analyzing potential impacts on the environment: (1) find that a categorical exclusion from the NEPA process applies; (2) issue an EIS; or (3) issue a Finding of No Significant Impact ("FONSI"). In so arguing, Missouri ignores the NEPA regulations for SEISs and the large body of case law upholding agencies' use of even non-NEPA documents to determine whether an SEIS is necessary. Because the Corps went beyond NEPA's requirements in preparing an EA to analyze the revisions to the Master Manual, this Court should deny Missouri's motion for summary judgment.

As discussed more fully in the Federal Defendants' memorandum in opposition to Missouri's motion for summary judgment ("Federal Defendants' Opposition"), NEPA requires agencies to prepare an SEIS if the agency (1) "makes substantial changes in the proposed action that are relevant to environmental concerns," or (2) if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c); *see Fed. Defs.' Opp'n* at 3–5. But, neither NEPA nor its

regulations address *the process* by which agencies are to analyze whether changes to a proposed action or new information are substantial enough to warrant supplemental NEPA work.

Accordingly, agencies use a variety of means to determine whether an SEIS is necessary. In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989), the Supreme Court of the United States upheld the Corps' use of a non-NEPA document — in that case, a Supplemental Information Report (“SIR”) — to analyze whether an SEIS was necessary. In the case at bar, the Corps used an EA to determine if an SEIS was necessary. NEPA does not forbid the use of an EA for this purpose, and the case law interpreting NEPA certainly allows it. *See id.*

Missouri's argument that an EA can only be prepared if accompanied by a FONSI misses the point entirely, because the purpose of the EA in this situation was to determine whether an SEIS was required. Thus, the Corps' preparation of an EA in this situation is fully consistent with NEPA and the relevant case law.

**B. The Corps Properly Determined that No SEIS was Necessary Because the Impacts of the Changes to the Master Manual Are Similar to or Less Than Those Previously Studied.**

Missouri's argument that the Corps has not adequately studied the spring rise also must be rejected. *See Missouri's Opp'n* at 6–8. Missouri does not argue that the Corps cannot rely on data from the FEIS, but argues instead that the Corps cannot rely on plans that were previously studied and rejected. *See id.* at 7. This argument, however, misses the mark because the Corps did not reject the spring rise plans studied in the FEIS. Instead, the Corps deferred decision on those plans in light of the FWS's 2003 Amended Biological Opinion (“2003 Amended BiOp”). *See* Record of Decision (“ROD”) (SAR 4 at Exhibit 1970) at 3–4. In the Corps' Record of Decision for the 2004 changes to the Master Manual, the Corps noted that the FWS found that

the Corps' proposed plan would likely result in jeopardy to the pallid sturgeon. *See id.* In light of the jeopardy determination, the FWS proposed a Reasonable and Prudent Alternative ("RPA"), which called for a spring rise beginning in 2006. *Id.* at 4. The Corps' ROD notes that it would evaluate the spring rise in the two-year period between the ROD and 2006, and gather input from regional stakeholders. *Id.* Accordingly, the Corps did not reject the spring rise alternatives it studied in the FEIS, but deferred a decision on those plans until further study and input from regional stakeholders.<sup>1/</sup> Thus, Missouri's argument that the Corps is relying on rejected alternatives is without merit.

Further, the Administrative Record supports the Corps' conclusion that no SEIS is required. The Corps must prepare an SEIS only when a change to the proposed action or new information "will 'affect the quality of the human environment' in a significant manner or *to a significant extent not already considered.*" *Marsh*, 490 U.S. at 374 (emphasis added); *Arkansas Wildlife Fed'n v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005) (citing *Marsh*, 490 U.S. at 374). Clearly, the Corps' chosen spring rise does not "provide a *seriously* different picture of the environmental landscape" than that previously considered. *See Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). The proposed rise has impacts that are within or less than any of the spring rise alternatives studied in the FEIS. As discussed more thoroughly in the Corps' other briefs, the March pulse is relatively small and is not to exceed 5,000 cubic feet per second ("cfs") over navigation flows and will in no event exceed the power

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<sup>1/</sup>This Court also acknowledged that because the spring pulse did not have to be implemented until March 2006, challenges to the 2003 Amended BiOp spring rise plan were not ripe for review in the summary judgment proceedings previously before this Court. *See In Re Operation of the Missouri River System Litigation*, 363 F. Supp.2d 1145, 1166 (D. Minn. 2004).

plant capacity of 35,000 cfs. *See* EA (SAR 8 at Exhibit 3088, Enclosure 2) at 13. The March spring pulse, therefore, is well within normal operating limits at Gavins Point and does not represent a significant departure from normal fluctuations under the current water control plan.<sup>2/</sup>

The May pulse also is similar to those studied in the FEIS. The FEIS examined a total of eleven spring pulse alternatives occurring in the May time frame, with peak rises ranging from 15,000 to 30,000 cfs over navigation flows. The flows the Corps examined in the FEIS would peak for a two week period. In contrast, the May spring pulse the Corps identified as the preferred alternative in the EA consists of a release between 9,000 and 20,000 cfs above navigation flows for a two day peak duration. Thus, the EA's preferred alternative has both a smaller release and a shorter duration than the alternatives the Corps previously studied. The administrative record, therefore, supports the Corps' conclusion that the smaller, shorter spring pulse would not present environmental impacts substantially different from those previously analyzed. Because the Corps had already studied alternatives with greater impacts than those of the proposed alternative, the administrative record supports its conclusion that no SEIS was necessary.<sup>3/</sup>

The administrative record supports the Corps' conclusion that no SEIS is necessary because the impacts of the proposed changes to the Master Manual do not vary substantially

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<sup>2/</sup>As explained in detail in the EA, the "peak releases included in both the March and May spring pulses are well within the normal operating range of Gavins Point Dam." *See* EA (SAR 8, Exhibit 3088) at 12–14.

<sup>3/</sup> In addition, as discussed below, the magnitude of both the March and May pulse are constrained by downstream flow limits. Once these flow limits are reached, the pulses are cut back. These flow limits are the same values as the most conservative flood control constraint targets and will provide similar downstream flood control during the spring pulse period to that which currently exists. *See* EA (SAR 8, Exhibit 3088) at 6, Section 2.4.2.

from the impacts of the 2004 Master Manual's Current Water Control Plan ("CWCP"). Missouri argues that the Corps' own analysis shows that the revision is worse than the current Master Manual in 8 of 15 categories. However, a review of the Corps' graphic comparative analysis (*see* EA (SAR 8, Exhibit 3088) at 14–21, Figures 3 through 17) shows that while there are differences between the CWCP (the 2004 Master Manual) and the preferred alternative, with one exception the differences vary at most by less than one percent.<sup>4/</sup> Pointedly, Missouri has not claimed that any one of these variations are significant.

Importantly, the Corps instituted certain safeguards that limit the impact of any spring rise and keep them within the range of previously considered impacts. As discussed more fully in Federal Defendants' Opposition, the proposed changes have storage level precludes that limit the amount of water withdrawn from storage in the reservoirs during droughts due to spring pulses. *See* EA (SAR 8, Exh. 3088) at 11; *Fed. Defs.' Opp'n* at 7–8. These precludes are within the range of those studied in the FEIS. EA (SAR 8, Exh. 3088) at 5 (Table 1).<sup>5/</sup> In addition, the Corps adopted the most conservative flood control constraints discussed in the FEIS, which means that the spring rises will not cause the flow to exceed the limits already set for flood control purposes. *Id.*; Master Manual (SAR 8, Exh. 3088) at 1-8 ¶ 1-03.2.5. In short, the

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<sup>4/</sup> Figure 14 shows approximately 10 percent difference between the proposed changes to the Master Manual and the CWCP for riverine tern and plover habitat benefits. *See* EA (SAR 8, Exhibit 3088) at 20. The proposed changes provide more benefits in this category than the CWCP.

<sup>5/</sup> In footnote 6 of Missouri's Opposition, Missouri claims that the decision to set the preclude at 36.5 Million Acre Feet ("MAF") rather than 40 MAF is not found in the record. This is not correct. In both the Draft and Final AOP, the Corps explained that a 36.5 MAF preclude was selected because it would provide the same likelihood of implementing a spring rise in 2006 as provided for under the plan identified by the Service in the 2003 Amended BiOp. *See Draft and Final 2005-2006 AOP*, (SAR 8, Exhibits 2963 and 3060) at 11 and 12, respectively.

downstream flow limits reduce or eliminate spring rises to limit potential downstream flooding. This conclusion is also noted in the Corps' Memorandum of Decision. Mem. of Decision (SAR 8, Exhibit 3088) at 2. Consequently, the Corps' safeguards support its conclusion that the proposed changes do not present a different picture of the environmental landscape than it previously considered.

In conclusion, the administrative record fully supports the Corps' conclusion that no SEIS was required because the impacts of the changes to the Master Manual are not significantly different than the CWCP or the alternatives previously studied. This Court, therefore, should grant summary judgment in favor of Federal Defendants.

**C. The Corps Exceeded NEPA's Requirements For Public Participation.**

Missouri alleges that, despite the Corps' lengthy and detailed public process with interested stakeholders and circulation of the Draft Annual Operating Plan, which included a draft of the spring rise technical criteria, the Corps violated NEPA by not presenting the draft EA for public comment.<sup>9</sup> *See Missouri's Opp'n* at 5. Missouri's argument fails, however, because NEPA does not require a draft EA be circulated for public comment. *See* 40 C.F.R. § 1501.4(e)(2); *Alliance To Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 115 (1st Cir. 2005). Nor does NEPA require that an agency's determination whether to prepare an SEIS be subject to public participation. *See Friends of the Clearwater v. Dombeck*, 222 F.3d

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<sup>9</sup>On page 9 of Federal Defendants' opposition, the brief erroneously suggests that the draft EA was presented for public comment and participation. In fact, the draft EA itself was not circulated to the public for comment. Instead, the technical criteria were circulated in draft form with the Draft Annual Operating Plan, and comments were received on the draft document. Based on comments received, the Corps eliminated a potential increase in the downstream flow limits in the final spring rise technical criteria.



552, 560 (9th Cir. 2000) (citing *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir. 1982), *rev'd on other grounds sub nom.*, 464 U.S. 312 (1984)). Accordingly, NEPA does not require that the Corps' EA, used to determine that no SEIS is necessary, be circulated for public comment.

In any event, however, while the Corps was not required to provide for public participation in this instance, the Corps went to extensive lengths to involve interested stakeholders in the process and attempted to reach a consensus. This process is detailed more fully in the Corps' other briefing. *See Federal Defendant Memorandum in Support of Motion for Summary Judgment* at 8–10. Indeed, one might conclude that because Missouri is the only stakeholder to bring a challenge to the spring rise technical criteria, the Corps' attempts to reach a consensus and incorporation of the stakeholders' input into the process was successful.

**D. The Proposed Changes Are Necessary to Avoid Jeopardy to the Pallid Sturgeon and a Violation of the Endangered Species Act.**

The FWS concluded in its 2003 Amended BiOp that the Corps' proposed plan would result in jeopardy to the endangered pallid sturgeon and recommended that the Corps adopt a bimodal spring pulse plan by 2006. The Corps' reliance on the FWS's expert opinion that a bimodal spring pulse is legal and complies with NEPA. Further, if the Corps had decided to ignore FWS's recommendation, it did so at the risk of substantial civil and criminal penalties under the ESA for "take" of an endangered species. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997). Accordingly, Missouri's argument that the Corps must manage the river solely for flood control purposes, even if that results in the Corps' violation of the ESA must be rejected. In any event, it is irrelevant to the issues before the Court, as case law clearly allows the Corps, where possible, to reasonably accommodate both flood control and the ESA, as occurred here.

**CONCLUSION**

For the foregoing reasons, the Corps respectfully requests that this Court grant its motion for summary judgment and dismiss Missouri's complaint.

Respectfully submitted this 8th day of September, 2006.

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SECRETARY OF THE ARMY, UNITED	)	LR 7.1(c) WORD COUNT
STATES DEPARTMENT OF DEFENSE,	)	COMPLIANCE CERTIFICATE
and BRIGADIER GENERAL	)	REGARDING
GREGG F. MARTIN,	)	FEDERAL DEFENDANTS'
	)	REPLY IN SUPPORT
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I, Devon Lehman McCune, certify that the Federal Defendants' Reply in Support of Their Motion for Summary Judgment complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used WordPerfect Version 12, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum and the Federal Defendants' Memorandum in Support of Their Motion for Summary Judgment together contain a total of 11362 words.

Date: September 8, 2006

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2006, I caused the Federal Defendants' Reply in Support of Their Motion for Summary Judgment to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

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Dated: September 8, 2006

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